

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

United States Courts  
Southern District of Texas  
FILED

DEC 19 2005

*Michael S. Kirby, Clerk of Court*

ELAINE L. CHAO, Secretary of Labor,  
United States Department of Labor, :  
Plaintiff, :  
v. : Civil Action No. \_\_\_\_\_  
M & D, INC., DBA MARCELO'S :  
FAJITA GRILL AND MARCELO :  
GARCIA :  
Defendants. :  
: \_\_\_\_\_

COMPLAINT

Plaintiff, Elaine L. Chao, Secretary of Labor, United States Department of Labor, brings this action to enjoin the defendants, M & D, Inc. dba Marcelo's Fajita Grill ("Marcelo's") and Marcelo Garcia ("Garcia") from violating the provisions of Sections 6, 7, 11(c), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended , 29 U.S.C. §201, et seq., hereinafter referred to as the Act, and to restrain defendants from withholding payment of minimum wage and overtime compensation found by the Court to be due employees under the Act, and an equal amount as liquidated damages due to the employees of Marcelo's listed in the attached Exhibit A.

I.

This court has jurisdiction over this action pursuant to sections 16 and 17 of the Act, 29 U.S.C. Sections 216 and 217 and 28 U.S.C. 1331 and 1345.

II.

1. Defendant, M & D, Inc. is now, and at all times hereinafter mentioned was, a corporation with a place of business and doing business at 11013 Delaney Street, La Marque, Texas

77568-2501, within the jurisdiction of this Court.

2. Defendant, Marcelo Garcia, has a place of business and doing business in La Marque, Texas, within the jurisdiction of this Court, where Garcia is, and at all times hereinafter mentioned was, the sole owner and proprietor of the defendant Marcelo's and actively manages, supervises and directs the business affairs and operations of the defendant, Marcelo's. Garcia acts and has acted, directly and indirectly, in the interest of the defendant, Marcelo's in relation to its employees and is an employer of these employees within the meaning of the Act.

III.

At all times hereinafter mentioned, Marcelo's has been an enterprise within the meaning of section 3(r) of the Act, 29 U.S.C. Sec. 203(r), in that Marcelo's has been, through unified operation or common control, engaged in the performance of related activities for a common business purpose.

IV.

At all times hereinafter mentioned, Marcelo's has been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1)(A) of the Act, 29 U.S.C. § 203(s)(1)(A), in that it has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person and in that it has an annual gross volume of sales made or business done of not less than \$500,000 (exclusive of excise taxes at the retail level which are separately stated).

V.

During the period beginning on May 4, 2003, defendants have violated and are violating the provisions of Sections 6 and 15(a)(2) of the Act, 29 U.S.C. §§ 206 and 215(a)(2), by paying

employees employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act at rates less than the minimum hourly rates required by Section 6 of the Act.

VI.

During the period since May 4, 2003, defendants have violated and are violating the provisions of Sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§ 207 and 215(a)(2), by employing employees in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act for workweeks longer than forty hours without compensating such employees for their employment in excess of forty hours per week at rates not less than one and one-half times the regular rates at which they were employed.

VII.

As a result of the violations of the Act, minimum wages and overtime compensation has been unlawfully withheld by the defendants from their employees.

VIII.

During the period since May 4, 2003, defendants violated the provisions of Sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c) and 215(a)(5), in that defendants have failed to make, keep and preserve adequate and accurate records of their employees and of the wages, hours, and other conditions and practices of employment maintained by them as prescribed by the regulations of the Administrator issued pursuant to Sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c) and 215(a)(5), and found in Title 29, Chapter VI, Code of Federal Regulations, Part 516 in that their records failed to show, among other things, the hours worked each day and the total hours worked each week by many of their employees.

IX.

Defendants have violated the Act. A judgment enjoining the alleged violations and restraining the withholding of minimum wages and overtime compensation found to be due its employees is specifically authorized by Section 17 of the Act, 29 U.S.C. § 217.

X.

WHEREFORE, cause having been shown, plaintiff prays for judgment against M & D, Inc., dba Marcelo's Fajita Grill and Marcelo Garcia as follows:

1. For an Order pursuant to Section 17 of the Act permanently enjoining and restraining defendants, their officers, agents, servants, employees, and those persons in active concert or participation with defendants, from violating sections 6, 7, 11(c), 15(a)(2) and 15(a)(5) of the Act; and
2. For an Order pursuant to Section 16(c) of the Act finding defendants liable for unpaid minimum wages and overtime compensation due to defendants' employees and for the liquidated damages equal in amount to the unpaid compensation found due defendants' employees listed in the attached Exhibit A (additional liquidated damages may be owed to certain employees presently unknown to plaintiff for the period covered by this complaint); or in the event liquidated damages are not awarded;
3. For an Order pursuant to Section 17 enjoining and restraining defendants from withholding payment of unpaid minimum wages and overtime compensation found due defendants' employees and pre-judgment interest computed at the underpayment rate established by the Secretary of Treasury pursuant to 26 U.S.C. § 6621; and
4. For an Order awarding plaintiff the costs of this action; and
5. For an Order granting such other and further relief as may be necessary and appropriate.

Respectfully submitted,

HOWARD RADZELY  
Solicitor of Labor

WILLIAM E. EVERHEART  
Regional Solicitor

Address:

U. S. Department of Labor  
Office of the Solicitor  
525 Griffin Street, Suite 501  
Dallas, Texas 75202  
Telephone (972) 850-3151  
Facsimile (972) 850-3101

RSOL Case No. 05-00844

MARGARET TERRY CRANFORD  
Counsel for Wage and Hour

By:

Brian L. Hurt  
BRIAN L. HURT  
Texas Bar. No. 24012876

Attorneys

Attorneys for Plaintiff

**EXHIBIT A**

**Guillermo Alvarado**

**Carlos Arellano**

**Felix Barbosa**

**Daniel Blackmon**

**Amy Collier**

**Melissa Elizondo**

**Ramon Escobedo**

**Eliud Garcia**

**Leonarda Garcia**

**Beatriz Guerrero**

**Stacey Jasso**

**Efrain Lopez**

**Miguel Loredo**

**Miriam S. Martinez**

**Gerardo Morales**

**Moises Moreno**

**Gerardo Rodriguez**

**Juan Rodriguez**

**Mario Rodriguez**

JS 44 (Rev. 3/99)

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is to be used by the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

ELAINE L. CHAO, Secretary of Labor,  
United States Department of Labor

(b) County of Residence of First Listed  
(EXCEPT IN U.S. PLAINTIFF CASES)

## DEFENDANTS

M&D, INC., DBA MARCELO'S FAJITA GRILL AND MARCELO GARCIA

DEC 19 2005

N. H. H. Clerk of Court

County of Residence of First Listed Gainesville  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Brian L. Hart, Esq.  
United States Department of Labor, Office of the Solicitor  
525 S. Griffin, Suite 501  
Dallas, Texas 75202 (972) 850-3100

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

|                                                      |                                                                                    |
|------------------------------------------------------|------------------------------------------------------------------------------------|
| X 1 U.S. Government Plaintiff                        | <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)          |
| <input type="checkbox"/> 2 U.S. Government Defendant | <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) |

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

|                                         |                            |                            |                                                         |                            |                            |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another                      | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation                                          | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

| CONTRACT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | TORTS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | PETITIION/PRINCIPAL                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | BANKRUPTCY                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | OTHER STATUTES                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgments<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Deductible Student Loans (Excl. Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability | <input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Asbestos, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury | <input type="checkbox"/> PERSONAL INJURY<br><input type="checkbox"/> 362 Personal Injury—Med. Malpractice<br><input type="checkbox"/> 363 Personal Injury—Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><input type="checkbox"/> PERSONAL PROPERTY<br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 610 Agriculture<br><input type="checkbox"/> 620 Other Prod. & Drug<br><input type="checkbox"/> 625 Drug Related Suits<br><input type="checkbox"/> 630 Liquor Laws<br><input type="checkbox"/> 640 R.R. & Truck<br><input type="checkbox"/> 650 Airline Regs.<br><input type="checkbox"/> 660 Occupational Safety/Health<br><input type="checkbox"/> 690 Other                                                                                                                                                                                                | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark                                                                                                                                                                                                                                                                  |
| REAL PROPERTY                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | CIVIL RIGHTS                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | P R I S O N E R                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Mgmt. Relations<br><input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><br><b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1995)(I)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DWOD/WW (405(d))<br><input type="checkbox"/> 864 SEDD Title XVI<br><input type="checkbox"/> 865 RSI (405(g)) | <b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1995)(I)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DWOD/WW (405(d))<br><input type="checkbox"/> 864 SEDD Title XVI<br><input type="checkbox"/> 865 RSI (405(g))                                                                                                                                                                                                                                                              |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <input type="checkbox"/> 871 IRS—Third Party<br>26 USC 7609                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <b>OTHER STATUTES</b><br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 892 Economic Stabilization Act<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 894 Energy Allocation Act<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 900 Appeal of Tax Determination Under Equal Access to Justice<br><input type="checkbox"/> 950 Constitutionality of State Statutes<br><input type="checkbox"/> 990 Other Statutory Actions |

## V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

X 1 Original Proceeding  2 Removed from State Court  3 Remanded from Appellate Court  4 Reinstated or Reopened  5 Transferred from another district (specify)

Appeal to District Judge from Magistrate Judgment  
 6 Multidistrict Litigation  7

## VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause.)

Do not cite jurisdictional statutes unless diversity.)

To enjoin the Defendants, M&D, Inc., dba Marcelo's Fajita Grill and Marcelo Garcia, from violating the provisions of Sections 6, 7, 11(c), 15(a)(2) and 15 (a)(5) of the Fair Labor Standards Act of 1938 (29 U.S.C. 201, et seq.)

VII. REQUESTED IN COMPLAINT:  CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 12-14-05

SIGNATURE OF ATTORNEY OF RECORD

Brian L. Hart